IN THE SUPREME COURT

APPEAL FROM THE
MICHIGAN COURT OF APPEALS

Judges Patrick M. Meter, Michael J. Talbot and Stephen L. Borrello

THE DETROIT EDISON COMPANY,

Appellant,

Supreme Court Case No. 125950

v

Court of Appeals No. 237872

MICHIGAN PUBLIC SERVICE COMMISSION

Appellee

In the matter of the approval of a code of conduct for CONSUMERS ENERGY COMPANY and THE DETROIT EDISON COMPANY	)	MPSC Case No. U-12134

BRIEF ON APPEAL – APPELLANT THE DETROIT EDISON COMPANY

*** * * ORAL ARGUMENT REQUESTED * * ***

Bruce R. Maters (P28080)
Jon P. Christinidis (P47352)
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, MI 48226-1203
(313) 235-7706

William K. Fahey (P27745)
Stephen J. Rhodes (P40112)
Foster, Swift, Collins & Smith, P.C.
Co-counsel for The Detroit Edison Company
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

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JURISDICTIONAL STATEMENT

The Detroit Edison Company ("Edison"), Michigan Electric Cooperative Association, et al ("MECA"), and Consumers Energy Company ("Consumers") applied for leave to appeal from Detroit Edison Company v Public Service Comm, 261 Mich App 1; 680 NW2d 512 (2004), lv granted, 688 NW2d 510 (2004) (Appendix 227a-242a). On November 5, 2004, this Court granted leave to appeal, limited to whether the December 2000 and October 2001 orders of the Michigan Public Service Commission are unlawful because they were not promulgated in conformity with the rulemaking provisions of the Administrative Procedures Act, MCL 24.201 et seq (Appendix 243a-244a). This Court has jurisdiction to review the consolidated cases by appeal. MCR 7.301(A)(2); MCR 7.302(G).

STATEMENT OF QUESTION PRESENTED

IS THE MICHIGAN PUBLIC SERVICE COMMISSION'S CODE OF CONDUCT UNLAWFUL BECAUSE IT WAS NOT ADOPTED IN COMPLIANCE WITH THE RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT?

Appellant Edison answers:	Yes
Appellee MPSC answered:	No
The Court of Appeals answered:	No

INTRODUCTION

This Court granted leave to appeal from a published Court of Appeals decision that erroneously failed to correct a violation of the Administrative Procedures Act ("APA"), MCL 24.201 et seq, and controlling precedent regarding the mandatory procedures for administrative rulemaking. Appellant The Detroit Edison Company ("Edison") is an electric utility that provides electricity primarily to retail customers in Southeastern Michigan. Appellee Michigan Public Service Commission ("MPSC" or "Commission") regulates Edison as an electric utility providing retail electric service in Michigan.[1]

This appeal involves a practice known as retail open access (also sometimes called "Customer Choice" or "retail wheeling"), in which customers of retail electric utilities can instead buy electricity from third party suppliers (known as "alternative electric suppliers"), and have that electricity delivered on the retail electric utility's wires.[2] In Consumers Power Co v Public

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[1] Edison is a subsidiary of DTE Energy, which is a holding company with numerous other subsidiaries, many of which are not involved in providing retail electricity in Michigan. The MPSC has no jurisdiction over Edison affiliates (sister companies under the DTE Energy holding company) that do business in other states, or that provide services over which the MPSC has no regulatory authority, such as landfill gas extraction and recovery, coal supply and transportation, rail services, development and operation of energy projects across North America, non-utility energy services to commercial and industrial customers, purchases and sales of energy commodities, and natural gas exploration, production, and interstate transportation, among other businesses. Some of Edison's affiliates are regulated by the Federal Energy Regulatory Commission ("FERC"), which has jurisdiction over wholesale electric sales and the interstate transmission of electricity. After the MPSC's rulings at issue, DTE Energy sold its electric transmission facilities to an independent third party, and now purchases that service to provide bundled electric service.

[2] Electric utilities such as Edison provide bundled (generation, transmission and distribution) electric service to their full service retail customers. Alternative electric suppliers provide electricity (generation service) to their retail customers, who receive that electricity through the electric utility's wires (distribution service). See generally, Consumers Power Co v Public Service Comm, 460 Mich 148, 152; 596 NW2d 126 (1999). Electric Utility is defined by MCL 460.562 as:

Service Comm, 460 Mich 148; 596 NW2d 126 (1999), this Court held that the MPSC lacked authority (at that time) to require retail open access. The Legislature subsequently "restructured" Michigan's electric utility industry through 2000 PA 141 ("Act 141"), MCL 460.10 et seq, in which the Legislature for the first time authorized the Commission to require retail open access service. Section 10a(4) of Act 141, MCL 460.10a(4), also directed the Commission to establish a code of conduct for both electric utilities and alternative electric suppliers.

On December 4, 2000, the Commission issued an Opinion and Order (Appendix 56a-77a) establishing a Code of Conduct (Appendix 78a-81a). On October 29, 2001, the Commission issued an Order on Rehearing (Appendix 89a-107a), which granted petitions for rehearing to the limited extent discussed in that Order, and adopted a modified Code of Conduct (Appendix 108a-113a). Edison, the Michigan Electric Cooperative Association, et al ("MECA") and Consumers Energy Company ("Consumers") filed claims of appeal, which the Court of Appeals consolidated (Docket Nos. 237872, 237873 and 237874, respectively). On March 2, 2004, the Court of Appeals issued an Opinion affirming the Commission. Detroit Edison Co v Public Service Comm, 261 Mich App 1; 680 NW2d 512 (2004), lv granted 688 NW2d 510 (2004). (Appendix 227a-242a).

> "a person, partnership, corporation, association, or other legal entity whose transmission or distribution of electricity the commission regulates . . ."

Alternative Electric Supplier is defined by MCL 460.10g as:

> "a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility."

This Court granted leave to appeal, limited to the issue of whether the MPSC violated the APA's rulemaking requirements in adopting the Code of Conduct (Appendix 243-244a). As explained below, the Code of Conduct consists of rules of general applicability to the entire electric industry in Michigan, yet the Commission failed to follow the APA's rulemaking requirements. The Court of Appeals panel in this case affirmed, disregarding a recent published opinion by Court of Appeals Judges Sawyer, Owens and Cooper in a closely analogous case, In re Public Service Commission Guidelines for Transactions Between Affiliates, 252 Mich App 254; 652 NW2d 1 (2002) ("In re PSC Guidelines;" vacating MPSC's "guidelines" regarding transactions between a regulated public utility and its nonregulated holding company, subsidiaries and affiliates, because the MPSC failed to engage in rulemaking as required by the APA). Therefore, Edison respectfully requests that this Court reverse the Court of Appeals decision (Appendix 227a-242a), the MPSC's December 4, 2000 Opinion and Order (Appendix 56a-77a), and the MPSC's October 29, 2001 Order on Rehearing (Appendix 89a-107a); and vacate the Code of Conduct (Appendix 108a-113a).

STATEMENT OF FACTS

In 1999, this Court held that the MPSC lacked statutory authority to compel Edison and other electric utilities to provide retail open access service. Consumers Power Co, supra. Edison cooperated with the Commission, however, to create a voluntary retail open access program in Commission Case No. U-11290. In its September 14, 1999 Opinion and Order in that case, the Commission also approved Edison's proposed Code of Conduct (Appendix 44a-46a) as part of that voluntary program.[3] On that same day, the Commission also initiated this Case No. U-12134 with an Order and Notice of Hearing that "conclude[d] that a contested case proceeding

[3] That Code of Conduct incorporated the FERC code of conduct ("Standards of Conduct for Public Utilities," 18 CRF §§37.1-37.4).

should be initiated for the purpose of determining what modifications, if any, should be made to the existing codes of conduct" (U-11290; U-12134 Order and Notice of Hearing dated September 14, 1999, p 3; Appendix 49a).

During this proceeding concerning the Code of Conduct for Edison's voluntary retail open access program, the Legislature enacted Act 141, which took effect on June 5, 2000. Act 141 provided the Commission with new statutory authority to require electric utilities to provide retail open access service. Subsection 10a(4) of Act 141, MCL 460.10a(4), also directed the Commission to establish a code of conduct for all electric utilities regulated by the Commission and for all alternative electric suppliers:

> "Within 180 days after the effective date of the amendatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b and 10bb." MCL 460.10a(4).

On June 19, 2000, the Commission issued an Opinion and Order, directing the presiding Administrative Law Judge to "schedule further proceedings" in this case in accordance with MCL 460.10a(4). (Appendix 52a). The Administrative Law Judge "determined that the best way to proceed would be to renotice the case to all electric utilities in Michigan and all known alternative [electric] suppliers and reconvene for another prehearing conference to establish procedure for the remainder of the case" (9 T 688; Appendix 54a). The proceedings continued, but were expanded to address a code of conduct applicable to all Michigan electric utilities and alternative electric suppliers of retail electric generation service in Michigan. The Commission's

Staff testified in the expanded, post-Act 141 proceedings, that the Code of Conduct should apply only to retail open access electric service.[4]

On December 4, 2000, the Commission issued an Opinion and Order (Appendix 56a-77a) adopting a new Code of Conduct with significantly expanded applicability (Appendix 78a-81a). On January 3, 2001, Edison filed a Petition for Rehearing, and Edison, Consumers and MECA filed a Joint Statement of Statutory Interpretation, Request for Immediate Interim Revision to §VI of Code of Conduct and Preservation of Rights Per MCR 7.209(A)(2). On January 23, 2001, the Commission issued an Order (Appendix 82a-85a) granting, in part, the request for immediate interim relief by providing that each electric utility and alternative electric supplier's compliance plan would not be due until sixty (60) days following issuance of the Commission's order on rehearing, reconsideration, and clarification. On October 29, 2001, the Commission issued an Order on Rehearing (Appendix 89a-107a), which granted petitions for rehearing to the limited extent discussed in that Order, and adopted a modified Code of Conduct (Appendix 108a-113a).

Edison, MECA and Consumers filed claims of appeal (Court of Appeals Nos. 237872, 237873 and 237874, respectively, which the Court of Appeals consolidated) challenging the Commission's Orders and Code of Conduct. On March 2, 2004, the Court of Appeals affirmed the Commission. Detroit Edison Co v Public Service Comm, 261 Mich App 1; 680 NW2d 512 (2004), lv granted 688 NW2d 510 (2004) (Appendix 227a-242a).[5] This Court granted leave to

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[4] "Staff believes the standards produced by this docket should apply only to the Retail Open Access Program participants, Detroit Edison's 90MW Experimental Program and Consumers Energy's Direct Access Program." (11 T 792; Appendix 55a).

[5] On December 28, 2001, Edison filed its Compliance Plan and Request for Waivers with the Commission in accordance with the Commission's January 23, 2001 Order (Appendix 82a-85a) and October 29, 2001 Order (Appendix 89a-107a). On October 3, 2002, the Commission issued seven orders (collectively Appendix 121a-181a) addressing compliance plans and requests for

appeal on November 5, 2004, limited to the issue of whether the MPSC's December 2000 and October 2001 orders are unlawful because they were not promulgated in conformity with the rulemaking provisions of the APA (Appendix 243a-244a). Additional information and discussion will be set forth in the Argument section of this brief where it is best understood in context.

STANDARD OF REVIEW

To prevail, Edison must prove the Commission's Orders and accompanying Code of Conduct are unlawful or unreasonable. MCL 462.26(8). The standard of review for legal questions is whether the Commission's orders are authorized by law. Const 1963, art 6, § 28. This Court reviews legal questions, including issues of statutory interpretation, de novo. In re MCI Telecommunications Complaint, 460 Mich 396, 413; 596 NW2d 164 (1999); Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991). The question of whether the Code of Conduct is unlawful because it was not promulgated under the APA's rulemaking procedures is reviewed de novo as a question of law. In re PSC Guidelines, supra, 252 Mich App at 263.

Reviewing courts may not abandon nor delegate their responsibility to interpret statutory language and legislative intent. In re Complaint of MCTA, 241 Mich App 344, 360; 615 NW2d 255 (2000) (reversing the MPSC). An agency's incorrect interpretation of a statute must be

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waivers. On October 24, 2002, Edison filed a timely claim of appeal (Docket No. 244531), which the Court of Appeals consolidated with MECA's and Consumers' appeals (Docket Nos. 244425 and 244429, respectively). The Court of Appeals affirmed the MPSC. Michigan Electric Cooperative Ass'n v Public Service Comm, unpublished opinion per curiam of the Court of Appeals, decided August 17, 2004 (Docket Nos. 244425, 244429 and 244531). On September 28, 2004, Edison applied for leave to appeal to this Court (Docket No. 127094), as did MECA (Docket Nos. 127099-101). On November 23, 2004, after the Court of Appeals denied Consumers' motion for reconsideration, Consumers applied for leave to appeal to this Court (Docket No. 127473). Those applications are pending.

reversed. Manufacturers Nat'l Bank v DNR, 420 Mich 128, 145; 362 NW2d 572 (1984); Davis v River Rouge Bd of Education, 406 Mich 486, 490; 280 NW2d 453 (1979) (rejecting agency's interpretation of statute); In re Complaint of Consumers Energy Co, 255 Mich 496, 503-504; 660 NW2d 785 (2002). To the extent that an administrative agency's order conflicts with a statute, the order is void. Manufacturers Nat'l Bank, supra, 420 Mich at 146.

On questions of fact, Edison must show that the Commission's findings of fact were not supported by competent, material and substantial evidence. Const 1963, art 6, § 28. Substantial evidence is evidence that a reasonable mind would accept as adequate to support a decision. Battiste v Dep't of Social Services, 154 Mich App 486, 492; 398 NW2d 447 (1986) (holding that agency's decision was not supported by evidence that a reasonable person would consider adequate).

ARGUMENT

THE MPSC's CODE OF CONDUCT IS UNLAWFUL BECAUSE IT WAS NOT ADOPTED IN COMPLIANCE WITH THE RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT.

A. The MPSC is Required to Promulgate Rules Pursuant to the APA.

The Commission has no common law powers, but instead possesses only the limited authority that the Legislature conferred upon it. Consumers Power Co, supra, 460 Mich at 155. This Court explained:

> "The [Commission] is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments." Union Carbide v Public Service Comm, 431 Mich 135, 146; 428 NW2d 322 (1988) (quoting Sparta Foundry Co v Public Utilities Comm, 275 Mich 562, 564; 267 NW 736 (1936)).

The Commission's authority must be conferred by clear and unmistakable statutory language. A doubtful power does not exist. Mason Co Civil Research Council v Mason Co, 343

Mich 313, 326-27; 72 NW2d 292 (1955). The Commission cannot expand its jurisdiction through its own acts or assumption of authority. Ram Broadcasting of Michigan v Public Service Comm, 113 Mich App 79, 92; 317 NW2d 295 (1982).

The MPSC's enabling statutes include Section 55 of the Public Service Commission Act, MCL 460.55, in which the Legislature authorized the MPSC to promulgate rules and regulations as follows:

> "Said commission shall have power and authority to make, adopt and enforce rules and regulations for the conduct of its business and the proper discharge of its functions hereunder, and all persons dealing with the commission or interested in any matter or proceedings pending before it shall be bound by such rules and regulations. The Commission shall also have authority to make and prescribe regulations for the conducting of the business of public utilities, subject to the jurisdiction thereof, and it shall be the duty of every corporation, joint stock company, association or individual owing, managing or operating any such utility to obey such rules and regulations." (Emphasis added)

In Section 7 of the Transmission of Electricity Act, MCL 460.557(6), the Legislature further required that the MPSC's rulemaking must be conducted pursuant to the APA:

> "The commission may promulgate rules for the conduct of its business and the proper discharge of its functions under this act, pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.238 of the Michigan Compiled Laws. A person dealing with the commission or interested in a matter or proceeding pending before the commission is bound by those rules." (emphasis added).

The APA defines a "rule" as (1) "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability," (2) "that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency. . . ." MCL 24.207. Where an agency's directive is in substance a rule, the agency cannot evade the APA's rulemaking requirements by labeling its directive as something other

than a rule. AFSCME v Mental Health Dep't, 452 Mich 1, 9; 550 NW2d 190 (1996) (holding that the Department of Mental Health's proposed revised guidelines and standard form contract prescribing department policies constituted rulemaking under the APA, so the department was required to follow the APA's procedural requirements for rulemaking).

A rule that does not comply with the APA's procedural requirements is invalid. MCL 24.243; Danse Corp v City of Madison Heights, 466 Mich 175, 181; 644 NW2d 721 (2002) (Assessor's manual was not promulgated as a rule, so it did not "have the force of law"); Goins v Jeep Eagle, Inc, 449 Mich 1, 10; 534 NW2d 467 (1995) (Secretary of State never properly promulgated the requirements set forth in a manual as a rule, so the requirements did not have the force of law); Coalition for Human Rights v DSS, 431 Mich 172, 188; 428 NW2d 355 (1988) (unanimously holding that DSS's telephone hearing policy violated APA's rulemaking provisions, and therefore lacked legal authority or effect); Pharris v Secretary of State, 117 Mich App 202, 204-205; 323 NW2d 652 (1982) (guidelines for hearing examiners were not binding because they were not promulgated pursuant to the APA); Mallchok v Liquor Control Comm, 72 Mich App 341, 347; 249 NW2d 415 (1976).

The legislative terminology is clear, and must be enforced according to its plain meaning. State Farm Fire and Casualty Co v Old Republic Ins, 466 Mich 142, 146, 644 NW2d 715 (2002); Lorencz v Ford Motor Co, 439 Mich 370, 376; 483 NW2d 844 (1992); Attorney General v Public Service Comm, 183 Mich App 692, 701; 455 NW2d 724 (1990). Whenever the MPSC adopts rules, it must do so in accordance with the APA's requirements.

Despite the APA's requirements and the limitations set forth in the MPSC's enabling statutes, the MPSC unlawfully adopted the Code of Conduct as a rule in this case, without following the APA's rulemaking requirements. As described in the Statement of Facts, the

proceedings in this case were initially limited to Edison's voluntary retail open access program, but the Commission later, in its final order, announced its belief that "Act 141 changed the nature of this case" (December 4, 2000 Opinion and Order, p 6, n 2; Appendix 61a). The Commission reversibly erred by continuing the "contested case" proceedings, to instead issue an order setting forth a completely new Code of Conduct for the entire electric utility industry (Appendix 78a-81a, revised on rehearing to the present Code of Conduct, Appendix 108a-113a).

Instead of the procedures used in this case, the Commission should have initiated a rulemaking proceeding, with proper notice and an opportunity for meaningful participation by all relevant parties. The Commission ignored these legal requirements and essentially admitted that it did not undertake a proper rulemaking proceeding because it would have been hard (December 4, 2000 Order, p 20, n 4; Appendix 75a). The APA's requirements cannot be avoided simply because an agency considers them to be inconvenient or burdensome. Ethyl Corp v Environmental Protection Agency, 306 F3d 1144, 1150 (DDC, 2002) (vacating "compliance assurance program" and remanding case to the Environmental Protection Agency with instructions to establish test methods and procedures by regulation).

This Court has specifically recognized the importance of enforcing the APA's rulemaking requirements despite claims that it would be more efficient to proceed otherwise:

> "Michigan's Administrative Procedures Act is unique in its extensive involvement of the Legislature in the rulemaking process. Its requirements undoubtedly yield a more burdensome rulemaking procedure than under the federal system. I am mindful that in adhering to its stringent requirements, some efficiency of government may be lost. This Court, however, must remain true to the statute's mandates. If the Legislature desires to shift the balance between efficiency and the democratic concerns addressed by the APA, it can do so. Concern for the efficient operation of our state agencies and departments, while valid, should not force this Court's hand." AFSCME v Mental Health Dept, 452 Mich 1, 15 n 11; 550 NW2d 190 (1996).

The Court of Appeals recently rejected similar action by the MPSC that avoided the APA's rulemaking requirements. In In re PSC Guidelines, supra, Court of Appeals Judges Sawyer, Owens and Cooper vacated the Commission's "affiliate transaction guidelines," explaining:

> "Invoking the public interest and the need for policy that is responsive to a changing industry, **the PSC eschewed the procedural mandates of the APA in favor of its own course of action. By choosing to implement 'guidelines' by order in a contested case against unnamed parties, yet with the force and effect of law, the PSC culled elements of rulemaking, adjudication, and general policy formulation, with little regard for the dictates of the APA.** While we do not doubt the PSC's legitimate concerns of lack of access to the accounts and records of a utility's nonregulated affiliates and subsidiaries, and the potential for 'cross-subsidization of nonutility investments through utility rates,' see Midland Cogeneration Venture [Ltd Partnership v Public Service Comm, 199 Mich App 286, 291; 501 NW2d 573 (1993),[6]] **the process utilized by the PSC constituted a rather heavy-handed rebuke of established APA procedures, and, accordingly, we are compelled to invalidate that process.**" (252 Mich App at 267-68, Emphasis added, footnote omitted).

Instead of following this precedent, which is binding on the Court of Appeals under MCR 7.215(J)(1), the Court of Appeals in this case simply cited the case and reached a contrary result, without any analysis (161 Mich App at 11; Appendix 237a).[7] Since the MPSC exceeded its

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[6]Notably, in Midland CogenerationVenture, 199 Mich App at 324, 326-27, dissenting Judge (now Justice) Taylor expressed disapproval for the MPSC's similar, earlier attempts to expand its authority to regulate utility affiliates' service(s), finding it "but the first step of a process of regulating entities that the PSC lacks the power to regulate, and constitutes an improper assertion of PSC jurisdiction." 199 Mich App at 327.

[7] The Court of Appeals also ignored other courts that have rejected similarly-defective codes of conduct. The Maryland Court of Appeals overturned the code of conduct enacted by Maryland's Public Utility Commission ("PUC") due to the PUC's failure to comply with that state's Administrative Procedures Act. Delmarva Power & Light Co v Public Service Comm, 370 Md 1; 803 A2d 460, 462, 470-82 (2001). In Dominion Resources v FERC, 286 F3d 586 (CA DC, 2002), the Court vacated a FERC order, where the FERC did not engage in rulemaking, but instead issued an unexpected order that arbitrarily and capriciously imposed an overly-restrictive

statutory rulemaking authority, and failed to follow the mandatory APA procedures, its orders should be reversed and its Code of Conduct should be vacated.

B. The Flawed Contested Case Proceeding Conducted by the MPSC Cannot Lawfully Substitute for Proper APA Rulemaking Proceedings.

The Court of Appeals reasoned that MCL 24.207(f) provides an exception to the APA's rulemaking requirements for "contested cases," and that the Commission properly conducted a contested hearing case proceeding (161 Mich App at 11-12; Appendix 237a-238a). The Court reversibly erred by failing to recognize that rulemaking was required, and an adjudicative proceeding was not a valid substitute. Rulemaking was required because "the PSC must promulgate rules 'for the conduct of its business and the proper discharge of its functions' to the extent it intends to make its policies binding on 'all persons dealing with the Commission or interested in any matter or proceeding before it ... .'" In re PSC Guidelines, supra, 252 Mich App at 264 (quoting MCL 460.55).

Under the APA, a "contested case" is defined as "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing" MCL 24.203(3). The Commission conducted the proceedings below as a "contested case," but the resulting Code of Conduct was not within the scope of the Commission's ratemaking, price-fixing, licensing or other contested-case adjudicatory authority. Consumers Power, supra, 460 Mich at 157-59. Therefore, the Commission's purported justification for

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code of conduct on a merged electric/gas pipeline company. In that case, the FERC applied the code to all energy affiliates, destroying integrations and efficiencies that existed before the merger. Similarly, here, the Commission must comply with the APA, and the Commission's Code of Conduct must be limited in accordance with Act 141. The Commission may not "use a tank to block a mouse hole" as the Dominion Court described the FERC's overreaching. 286 F3d at 593.

using a contested case fails as a matter of law. In re PSC Guidelines, supra, 252 Mich App at 265-66.

By Legislative definition, a contested case proceeding involves an individual named party and a disputed set of facts, and results in an order that retroactively binds the agency and the named party. In re PSC Guidelines, supra, 252 Mich App at 267. The proceedings below and the resulting Code of Conduct directly contradict these three indicia of a contested case.

- Instead of applying to a "named party," the Code of Conduct purports to apply to the broad class of "all electric utilities as defined in MCL 460.562 and to alternative electric suppliers, as defined by MCL 460.10g, who, together with their affiliates, provide regulated services in Michigan and unregulated services" (Code of Conduct, p 1, § I; Appendix 108a).[8]
- Instead of a "disputed set of facts" regarding past events, the Commission speculated about what might happen in the future. The Commission's findings are unsupported and Edison disputes the Commission's speculation, as further explained below; however, for the contested case versus rulemaking analysis, it is sufficient to recognize that there is not a specific set of adjudicative facts in this so-called "contested case."
- Instead of "retroactively" binding the Commission and named party(ies), the Code of Conduct purports to operate prospectively to require and proscribe certain future conduct.

[8] The definitions of "electric utility" and alternative electric supplier" are set forth in footnote 2.

The Commission's limited ability to develop some policies on a case-by-case basis is justified only by the agency's need to respond to actual cases in controversy. In AFSCME v Wayne Co, 152 Mich App 87, 98; 393 NW2d 889 (1986), the Court of Appeals explained:

> "It is impossible to promulgate specific administrative rules in anticipation of every conceivable situation prior to the enforcement of a statute. . . . An administrative agency may thus announce new principles of law through adjudicative proceedings in addition to doing so through its rulemaking powers. . . . The effective administration of a statute by an administrative agency cannot always be accomplished through application of predetermined general rules. Rather, some principles of interpretation must evolve in response to **actual cases in controversy** presented to the agency. An administrative agency must therefore have the authority to act either by general rule or by individual order." (citations omitted, emphasis added).

An agency may adopt a new policy through rulemaking or through adjudication of an actual case. An agency cannot, however, base a new prospective policy on speculation in an adjudicative proceeding where the new policy is not supported by competent, material and substantial evidence on the record. Mich Const 1963, art 6, § 28. This limitation on agency authority is necessary to ensure full and fair consideration of the issue(s). Otherwise, the issue(s) can be presented only in speculative terms (if at all), and those affected lack a meaningful opportunity to be heard. See generally, Traverse Oil Co v NRC Chairman, 153 Mich App 679, 688; 396 NW2d 498 (1986) ("due process and the Administrative Procedures Act require that a party in a contested case be given timely and adequate notice detailing the reasons for the proposed administrative action").

Although a contested case can appropriately establish policy under some limited circumstances, the "contested case" proceeding below does not support the Code of Conduct. The burdens of proof and persuasion were on the parties who desired to change the September 14, 1999 pre-existing and approved codes of conduct. MAC R 460.17515. Things not proven

must be taken as not existing, since a decision cannot be based upon conjecture. Star Steel v USF&G, 186 Mich App 475, 481; 465 NW2d 17 (1990). Edison was not required to disprove, or even respond to, unfounded allegations. Lendberg v Brotherton Iron Mining Co, 75 Mich 84, 89; 42 NW 675 (1889); Yellow Freight System, Inc v Public Service Comm, 73 Mich App 476, 488; 252 NW2d 495 (1977) ("If all the testimony in this regard was nebulous, the complainants failed to carry their burden").

The Commission's orders tellingly lack any meaningful attempt to support the Code of Conduct with citations to the evidentiary record. Instead, the Commission asserted: "The Commission is well aware from past audits and reports of affiliate transactions, in this state and elsewhere, of the opportunities and incentives for abuses" (December 4, 2000 Opinion and Order, p 6; Appendix 61a).[9]

The Commission's orders do not even hint at what "past audits and reports of affiliate transactions, in this state and elsewhere" the Commission had in mind, and Edison objects to their accuracy and materiality. Shelman v Heckler, 821 F2d 316, 321-22 (CA 6, 1987) (holding that the Administrative Law Judge improperly took administrative notice of alleged fact without citation of any authoritative references or any other evidence).

Const 1963, art 6, § 28 requires the Commission's findings to be supported by competent, material, and substantial record evidence – not just the Commission's "speculation". In re Complaint of Pelland, 254 Mich App 275, 286; 658 NW2d 849 (2003), lv den 469 Mich 914 (2003) (reversing MPSC decision where the complainant failed to carry her burden of proof, and the Commission "engaged in unsupported speculation").

[9] See also, the MPSC's October 3, 2002 Detroit Edison Order, which similarly relies on unidentified "letters expressing concern about utilities" (Appendix 134a).

Guidance is provided by Ludington Service Corp v Comm'r of Insurance, 444 Mich 481; 511 NW2d 661 (1994), amended 444 Mich 1240 (1994), which concerned an agency exceeding the limits of its statutory authority, as well as basing decisions on speculative concerns instead of the required competent, material and substantial evidence. That case concerned a bank's business plan to purchase and operate an existing insurance agency. The acting commissioner of insurance issued a declaratory ruling that the business plan would violate the Insurance Code. The commissioner based his decision on speculation about possible business practices that are much like the purported "opportunities and incentives for abuse" on which the Commission based the Code of Conduct. This Court unanimously reversed, because the commissioner misapplied the law and based his decision on speculation. More specifically:

- The commissioner reasoned that the bank's plan would violate MCL 500.1207(3) because it would amount to procuring or inducing business or furnishing leads or prospects to the insurance agency, with profits benefiting the bank via dividend payments. 444 Mich at 491-92 This Court found that there was no "kickback" problem with the business plan, and "the record is devoid of any other competent, material and substantial evidence necessary to support a violation of § 1207(3)". Id, at 494-5.
- The commissioner next ruled that the bank's informational mailings would violate MCL 500.2077(2) because they would be received by some customers who are required to obtain insurance as a condition of their mortgage, and that if the insurance agency sold insurance and was profitable, then the profits would inure, directly or indirectly, to the bank Id at 496. This Court again rejected the commissioner's unsupported and attenuated reasoning, and explained "the

commissioner lacked the necessary direct evidence to find that there would be an improper use of information." Id at 497.

- The commissioner also relied on MCL 500.1207(5) to support his theory that operations in accordance with the business plan would result in threats and intimidation of bank customers to purchase insurance through the insurance agency. Id at 498. The Court again rejected the commissioner's decision as unsupported by the record, explaining: "This abuse may occur in the future, but at this point the commissioner's concern is mere speculation, unsupported by substantial evidence." Id at 501 (emphasis added).

Similarly, the Code of Conduct is based on "mere speculation, unsupported by substantial evidence," and should therefore be vacated. Fundamental due process requires notice and an opportunity to be heard. This requirement is echoed in the Commission's rule regarding official notice. MAC R 460.17327. Edison was, and is, entitled to address the allegations against it. Moreover, under the Michigan Constitution, Edison is entitled to fair and just treatment. Mich Const 1963, art 1, § 17. Act 141 did not, and could not, change these Constitutional standards.

Fundamental due process requires both a **meaningful** notice of a hearing and a **meaningful** hearing. Gonzales v United States, 348 US 407, 415; 75 S Ct 409; 99 L Ed 467 (1955). The United States Supreme Court observed:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them . . . **Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard on its proposals before it issues its final command**". Id, 348 US at 413, n 5 (emphasis added).

These principles are well established in Michigan law. See, Viculin v Dept of Civil Service, 386 Mich 375, 399; 192 NW2d 449 (1971) and cases cited therein.

Due process protections are also codified in the Michigan APA. (See, for example, MCL 24.271, which requires that Edison be provided an opportunity to be heard, including reasonable notice of a hearing, which shall include: "A statement of the legal authority and jurisdiction under which the hearing is to be held" MCL 24.271(2)(b), and "A reference to the particular sections of the statutes and rules involved." MCL 24.271(2)(c)). The Commission's injection of new theories into this case violated the APA and the due process protections embodied therein. See, Viculin, supra, 386 Mich at 399; accord, Tally v City of Detroit (On Rehearing), 58 Mich App 261, 264; 227 NW2d 214 (1974) (absent a waiver, a licensee is entitled – at a minimum – to a reasonably definite statement of the charges levied against the licensee).

With respect to the Code of Conduct, Edison prepared and presented its case in response to the limited nature of the contested case proceedings. The Commission's own Staff testified, subsequent to the enactment of Act 141, that the Code of Conduct should apply only to retail open access electric service (11 T 792; Appendix 55a). Edison was not accorded notice and an opportunity to present proof and argument regarding the Commission's new view of this case, which the Commission first announced after the hearings and briefing (December 4, 2000 Opinion and Order, p 6, n 2; Appendix 61a). Bendix Corp v FTC, 450 F2d 534, 537, 542 (CA 6, 1971) (vacating agency decision where agency violated the federal APA by changing its theory of the case, without notice to the affected party, and then finding adversely to that party); NLRB v Johnson, 322 F2d 216 (CA 6, 1963).

In summary, the APA required the Commission to engage in rulemaking. The Commission failed to do so. No exception applies, and even if one did, the Commission failed to

comply even with the essential requirements of an adjudicative proceeding. Therefore, the Code of Conduct should be vacated.

C. Compliance With Rulemaking Procedures Is An Essential Protection Against the Commission Exceeding the Scope of Its Limited Authority.

The Court of Appeals also ignored the essential purposes underlying the Legislature's rulemaking requirements. In the APA, the Legislature prescribed a careful and deliberate system for rule promulgation, which is "'**calculated to invite public participation in the rulemaking process, prevent precipitous action by the agency, prevent the adoption of rules that are illegal or that may be beyond the legislative intent**, notify the affected and interested persons of the existence of the rules, and make the rules readily accessible after adoption.'" Coalition for Human Rights, supra, 431 Mich at 189-90, quoting Bienenfeld, Michigan Administrative Law (1st ed.), § 4, p 4-1 (emphasis added).

The Legislature established essential checks and balances in the APA rulemaking procedures to prevent the exact type of unauthorized self-expansion of administrative agency power that has occurred here. This Court explained:

> "**Since the adoption of a rule by an agency has the force and effect of law and may have serious consequences of law for many people, the Legislature has proscribed an elaborate procedure for rule promulgation.** As set forth in the APA, 1969 PA 306, ch 3, §§31-64, MCL 24.231-24.264; MSA 3.560(131)-3.560(164), **that process requires public hearings, public participation, notice, approval by the joint committee on administrative rules, and preparation of statements, with intervals between each process.**
>
> This action was taken because, in recent years, legislative bodies have delegated to administrative agencies increasing authority to make public policy and, consequently, have recognized a need to 'ensure that none of the essential functions of the legislative process are lost in the course of the performance by agencies of many law-making functions once performed by our legislatures.' Bonfield, State Administrative Rule Making, § 1.1.1, p 4. **Thus,**

> **the question** whether the policy may be adopted without compliance with the APA **is more than a question of notice and hearing requirements. It is a question of the allocation of decision-making authority**." Coalition for Human Rights, supra, 431 Mich at 177-78 (emphasis added).

Edison's application for leave to appeal discussed, among other things, the limited scope of the MPSC's regulatory authority under its enabling statutes, as amended by Act 141. Edison recognizes that the Court granted leave to appeal on the rulemaking issue only. It should be noted, however, that the MPSC's disregard for the APA's procedural requirements partially obscures its broader disregard for the statutory limits on the MPSC's substantive authority. Requiring the MPSC to follow the APA rulemaking procedures, including review by the Office of Regulatory Reform, the Legislative Service Bureau, and the Joint Committee on Administrative Rules will more likely result in the promulgation of rules that are within the Legislative boundaries of Act 141 than would be the case by allowing the MPSC to define its own boundaries. Failure to require adherence to the APA's rulemaking requirements would permit the MPSC to undertake any number of future proceedings with unnamed parties, simply call the proceeding a "contested case," have "evidentiary" hearings, speculate about what might happen in the future, and then apply its ruling prospectively to entire industries without effective legislative or judicial review.

In its review of this appeal, the Court of Appeals disregarded the limits of the MPSC's substantive authority under Act 141, "because we find that MCL 460.6 grants the PSC broad discretion over all matters pertaining to public utilities" (261 Mich App at 9; Appendix 235a). The Court of Appeals' holding directly contradicts this Court's repeated holdings that MCL 460.6 is merely an outline of the Commission's jurisdiction, and not a grant of specific powers. Consumers Power, supra, 460 Mich at 160-61; Union Carbide, supra, 431 Mich at 147; Huron

Portland Cement Co v Public Service Comm, 351 Mich 255, 263; 88 NW2d 492 (1958). Other panels of the Court of Appeals have also recently issued a series of decisions rejecting the MPSC's attempts to exceed the statutory limits that the Legislature set in Act 141. Detroit Edison Co v Public Service Comm, ___ Mich App ___; ___ NW2d ___ (November 23, 2004; Docket No. 247930); Detroit Edison Co v Public Service Comm, 261 Mich App 455; 683 NW2d 188 (2004); Consumers Energy Co v Public Service Comm, 261 Mich App 455; 683 NW2d 188 (2004). See also, In re Complaint of Pelland, supra, 254 Mich App at 688-89 (holding that the MPSC exceeded its authority).

Section 10(2) of Act 141 sets forth the Legislature's purpose concerning retail open access in Michigan:

> "(2) The purpose of sections 10a through 10bb [i.e. all of Act 141] is to do all of the following:
>
> (a) To ensure that all **retail** customers **in this state of electric power** have a choice of **electric suppliers**.
>
> (b) To allow and encourage the Michigan public service commission to foster competition **in this state** in the provision of **electric supply** and maintain regulation of **electric supply** for customers who continue to choose **supply from incumbent electric utilities**.
>
> (c) To encourage the development and construction of merchant plants which will diversify the ownership of **electric generation in this state**.
>
> (d) To ensure that all persons **in this state** are afforded safe, reliable **electric power** at a reasonable rate.
>
> (e) To improve the opportunities for economic development **in this state** and to **promote financially healthy and competitive**

utilities in this state". (MCL 460.10(2) Emphasis added)

Words are given meaning by their context. Consumers Power, supra, 460 Mich at 163, n 10. The Legislature directed the Commission to "establish a code of conduct." (MCL 460.10a(4)) in the context of Act 141's purposes concerning retail electric generation supply service in Michigan (MCL 460.10(2))[10]. It is axiomatic that the Legislature's intent is to be implemented. In re MCI Telecommunications Complaint, supra, 460 Mich at 411 ("The primary goal of statutory interpretation is to give effect to the intent of the Legislature"). When determining legislative intent, statutory language should be given a reasonable construction considering the statute's purpose and the object sought to be accomplished. Joy Management Co v Detroit, 176 Mich App 722, 730-731; 440 NW2d 654 (1989). An act must be read in its entirety so as to produce, if possible, a harmonious and consistent enactment as a whole. Statutes are to be construed so as to avoid absurd or unreasonable consequences. Id.

The Court may wish to provide further guidance on this matter, particularly if this case is remanded to the MPSC for rulemaking, since that rulemaking cannot lawfully exceed the scope

[10] A review of the remaining subsections of Section 10a reflects the same limitation. Subsection 10a(1) directs the Commission to issue orders that will allow retail customers to choose an alternative electric supplier and will ensure electric utilities recover stranded costs. Subsection 10a(2) directs the Commission to issue orders establishing a licensing process for alternative electric suppliers, and to take other action with respect to the regulation of alternative electric suppliers. Subsection 10a(3) directs the Commission to issue orders to ensure that customers are not switched among alternative electric suppliers without their consent. Subsection 10a(5) effectively "grandfathers" prior Commission orders issued concerning retail open access. Subsection 10a(6) discusses "self-service" power. Subsection 10a(7) discusses "affiliate wheeling" of power. Subsection 10a(8) preserves pre-existing power supply contracts between electric utilities and "qualifying facilities." Subsections 10a(9), 10a(10) and 10a(11) give the Commission direction concerning recovery of utility stranded costs caused by the introduction of retail open access. Subsection 10a(12) gives the Commission direction concerning other ratemaking matters resulting from retail open access. The entire focus of Section 10a (and of the remainder of Act 141) is retail open access, and nothing in Section 10a supports the conclusion that the Legislature intended to empower the Commission to regulate anything beyond retail open access activities.

of the MPSC's regulatory authority. See, MCL 460.55 (quoted in relevant part above, stating that the Commission's rulemaking is "subject to the jurisdiction thereof"). Therefore, in addition to requiring adherence to the APA's procedural requirements for rulemaking, the Court should also direct that any rules promulgated on remand should be confined to the control of retail open access service as addressed in Act 141.

RELIEF

Appellant The Detroit Edison Company respectfully requests that this Court:

A. Find that the Court of Appeals erred in failing to rule that the MPSC violated the Administrative Procedures Act in adopting the Code of Conduct;

B. Reverse the Court of Appeals decision (Appendix 227a-242a), the MPSC's December 4, 2000 Order (Appendix 56a-77a), and the MPSC's October 29, 2001 Order on Rehearing (Appendix 89a-107a); and

C. Vacate the Code of Conduct (Appendix 108a-113a).

To the extent that this case is remanded to the MPSC to promulgate a Code of Conduct pursuant to the APA's rulemaking requirements, Edison further requests that the Court direct that the resulting rules may not lawfully apply beyond the activities and relationship between an electric utility or alternative electric supplier and an affiliate concerning the provision of retail open access electric generation supply service in Michigan.

Respectfully submitted,

Bruce R. Maters (P28080)
Jon P. Christinidis (P47352)
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, MI 48226-1203
(313) 235-7706

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Co-counsel for The Detroit Edison Company

Dated: January 3, 2005

By: _____

William K. Fahey (P27745)
Stephen J. Rhodes (P40112)
313 S. Washington Square
Lansing, MI 48933
(517) 371-8100

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